IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 417 OF 2005

Ashok @ Pappu Harbans Rajput ... Appellant (Ori.Defendant)

V/s

Sou. Tarabai Shankar Manjule ... Respondent

Mr. Uday Warunjikar with Rajesh A. More for the appellant.

Mr. G.S. Godbole for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 29TH SEPT., 2005

P.C.:

1. This is an appeal preferred by the appellant against the judgment and order passed by the Addl. District Judge, Raigad-Alibag, dated 5th October, 2004 allowing the appeal of the plaintiff reversing the judgment and order passed by the Trial Court dated 31.3.2000 whereby the Trial Court dismissed the suit for specific performance of the contract. The appellate Court has decreed the suit for specific performance.

2. I have heard the learned counsel for both parties. Perused the record.

3. The plaintiff filed the suit for specific performance of the agreement of sale dated 3.8.1992 executed between the parties with regard to the suit property bearing C.T.S.No.1513 Plot No.161 admeasuring 230.8 sq.mtr. and out of that property, 321 sq.ft. i.e. 30 sq.mtr. is the disputed suit property. The plaintiff came with the case that she had constructed one building by name Santoshi Mata in the suit property and it is in her possession. On 19.7.1992 the defendant has demolished the house. The plaintiff lodged the complaint to the police station. She had also filed a Civil Suit bearing Special Civil Suit No. 330 of 1992 in the Court of Civil Judge, S.D., Panvel for declaration and injunction. The defendant contested the matter. However, after intervention of some persons, there was an attempt to settle the suit between the parties and whereby defendant agreed to sell out some portion of the property to the defendant. On 3.8.1992, an agreement of sale came to be executed for a consideration of Rs.15,000/- in respect of the suit property and at the foot of such agreement the entire consideration came to be paid and possession was handed over to the plaintiff. As per the terms and conditions of the agreement, the defendant was to execute the sale

deed for consideration of Rs.15000/- and, therefore, the plaintiff was required to compromise the suit bearing City Civil Suit No. 330 of 1992. It is the case of the plaintiff at the time of so called agreement of sale that two persons were present and plaintiff had paid consideration to the defendant on 3.8.1992 of which defendant passed receipt. Defendant is alleged to have not acted upon as per the agreement and failed to execute the sale deed. Notice was issued on 1.3.1993 which was refused by the defendant and hence the suit is filed.

4. According to the plaintiff, defendant has moved an application at the office of Nagar Parishad, Panvel and plaintiff raised objection on 17.3.1993. According to the plaintiff, he was ready and willing to perform his part of the contract and he is ready to obtain a sale deed duly executed, however, the defendant avoided to excecute the sale deed, which forced the plaintiff to file the suit.

5. The defendant contested the suit inter-alia denying the allegations made by the plaintiff though the execution of the agreement and factum of handing over possession to the plaintiff and receipt of consideration

are admitted. It is the case sought to be made out on behalf of the defendant that it was to the knowledge of the plaintiff that terms and conditions incorporated in the agreement of sale could not be performed by the plaintiff and, as such, she had no right to file the suit for specific performance of the contract. According to the defendant, it was agreed between the parties by Condition No.10 that Special Civil Suit pending between the parties was to be withdrawn by compromise and compromise decree was to be obtained and it was not carried and further the suit was withdrawn and, therefore, there was breach of Condition No.10 on the part of the plaintiff and hence, on this and such other grounds, the suit was sought to be dismissed.

6. The Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiff had failed to prove his case in toto. According to the Trial Court, the plaintiff also failed to prove that he was ready and willing to perform his part of the contract and, as such, the plaintiff was not entitled to the reliefs claimed by them.

The appeal was carried to the District Court, Raigad, at Alibag. The learned Addl. District Judge, after

hearing both parties on the basis of available evidence came to the conclusion that the Trial Court had erred in holding that the plaintiff had not proved his case and reversed the Trial Court order and decreed the suit by allowing the appeal. It was held by the lower appellate Court that the plaintiff is entitled to the decree of specific performance of the contract. However, he was held not entitled for consequential relief of injunction and, as such, the appeal came to be allowed. Hence the present appeal.

7. At the outset, it may be noted that tyhere is no substantial question of law involved in this case. The learned counsel for the appellant sought to submit that the lower appellate Court was not justified in reversing the finding recorded by the Trial Court without having any discussion about the readiness and williness as well as in not framing such issue as well as the possession of the property. It was further submitted that, only because the defendant did not enter the witness box the lower appellate Court was wrong in drawing the adverse inference against it. It was also submitted that due to breach of Condition No.10, agreement between the parties, there was impossibility in performing the contract and, as such, the decree passed by the lower

appellate Court for specific performance was wrong. In this regard, it must be noted that though it is alleged that lower appellate Court did not raise the specific question with regard to the plaintiff's readiness and willingness to perform his part of the contract, the factual matrix involved in the appeal definitely shows that plaintiff was ready and willing to perform his part of the contract as the agreement between the parties was specific on the point that execution of the sale deed was to be made on receipt of the consideration for which purpose even possession of the property was also transferred to the plaintiff. Moreover, perusal of the judgment of the lower appellate Court also shows that the learned appellate Court has indeed referred to the question of readiness and willingness though in cursory manner. However, the evidence on record itself is sufficient to show that the plaintiff did show his readiness and willingness by payment of consideration and also called upon the defendant by notice dated 1.3.1993 which showed the intention of the plaintiff that he was ready and willing to perform his part of the contract. Therefore, merely because lower appellate Court has not discussed the point elaborately, it is quite clear from the judgment that it has recorded his finding on the said point and, therefore, it cannot be

said to be a substantial question of law.

Similarly, the issue is sought to be raised regarding breach of Condition No.10 of the agreement between the parties. The document of agreement is brought to my notice. Condition No.10 is to the effect that, after the transaction between the parties was over, the Special Civil Suit No.330 of 1992 was to be withdrawn by the plaintiff by filing compromise purshis which was not done. Instead of this, it is submitted that, the suit was withdrawn. In my considered view, when the suit is withdrawn, Condition No.10 looses its importance and definitely it cannot be said that the contract is rendered impossible to be performed.

8. In view of this position, I hold that the appeal has no merits and, as such, deserves to be dismissed for want of involvement of any substantial question of law.

In the result, the appeal stands dismissed with no order as to costs. Consequently, Civil Application No. 722 of 2005 also stands dismissed with no order as to costs.

.....